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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
(THE HON. DANA M. SABRAW)

I.

## **STATEMENT OF FACTS**

15 The following statement of facts is based, in part, on the  
16 indictment, the complaint and initial statement of facts and other  
17 information provided by the United States Attorney's office. Counsel  
18 has received approximately 120 pages of discovery thus far. The facts  
19 set forth in these motions are subject to amplification and/or  
20 modification at the time these motions are heard and are not adopted by  
21 the defense.

22 On or about December 8, 2007, undercover agents from the U.S.  
23 Department of Interior, Bureau of Land Management (BLM), the Drug  
24 Enforcement Agency (DEA), and the Federal Bureau of Investigation (FBI)  
25 were conducting surveillance of the Midway campground area approximately  
26 .9 miles north of the international Border with Mexico in Imperial  
27 County. During this surveillance, some occupants of the campsite were  
28 acting suspiciously according to agents by riding their ATV's in the

1 dark, without headlights.

2 At approximately 8:20 p.m., agents observed who they later  
3 identified as Jesus Trapero-Zazueta put out a campfire and a person they  
4 identified as Martin Morales Lozano-Vargas departed the area on an ATV  
5 with the lights out. At approximately 8:30 p.m., Lozano Vargas returned  
6 to the camp still driving without headlights. Agents then observed with  
7 night vision goggles, several ATVs travelling without headlights and  
8 with large bundles attached to the back of those ATVs.

9 Agents believed this activity to be consistent with drug smuggling  
10 activity, so they continued to observe the campsite where the ATVs  
11 riders off-loaded the bundles onto a flat bed trailer, at the direction  
12 of Lozano-Vargas. After the trailer was loaded, the ATVs departed with  
13 their lights on. Agents then observed Trapero Zazuete, Lozano Vargas,  
14 and a man they later identified as Christian Maria Rodriguez remove the  
15 bundles from the trailer and walk around a corner, out of sight towards  
16 a 2007 "Cruise America" rental motorhome (CA Lic. 5UVF195), which was  
17 attached to the trailer. Agents also saw a man later identified as Adan  
18 Magana, Jr., sitting in a chair within the campsite, whom appeared to  
19 be acting as a lookout.

20 At approximately 11:50 p.m., agents from the BLM, DEA, FBI and ICE  
21 with assistance from the CHP, and Imperial County Sheriff's Department,  
22 knocked on the door of the motorhome and made contact with Rodriguez.  
23 Agents took all the men out of the motor home, and also found another  
24 woman, Margarita Heredia Vargas, emerge from the motor home. When  
25 agents entered the motor home, they smelled what they believed to be  
26 marijuana. Several bundles (approximately 47) were found in the bedroom  
27 area in the rear. The total weight of those bundles was approximately  
28 382.08 kilograms.

1 Mr. Lozano Vargas was later interrogated, but the circumstances  
2 surrounding that interrogation are not clear. He made statements during  
3 this time. He is currently released on bail and the case is pending  
4 before this court.

II.

**THE COURT SHOULD COMPEL THE GOVERNMENT TO PRODUCE DISCOVERY**

7 Martin Morales Lozano Vargas makes the following discovery motion  
8 pursuant to Rule 12(b) (4) and Rule 16. This request is not limited to  
9 those items that the prosecutor has actual knowledge of, but rather  
10 includes all discovery listed below that is "in the possession, custody,  
11 or control of any federal agency participating in the same investigation  
12 of the defendant." United States v. Bryan, 868 F.2d 1032, 1036 (9th  
13 Cir.), cert. denied, 493 U.S. 858 (1989).

14       *Mr. Lozano Vargas may eventually also request a detailed list of*  
15       *specific items that may not yet have been produced, and is requesting*  
16       *that the government turn over and allow his counsel to view and inspect*  
17       *all items at the earliest possible date. He also specifically requests*  
18       *that the government retain, preserve and prevent from destruction, all*  
19       *evidence seized in this case (Including the marijuana and packaging) so*  
20       *that counsel may have the opportunity to re-test it and have it's own*  
21       *expert examine it if necessary.*

22 (1) Mr. Lozano Vargas's Statements. The government must disclose:  
23 (1) copies of any written or recorded statements made by Mr. Lozano  
24 Vargas; (2) copies of any written record containing the substance of any  
25 statements made by Mr. Lozano Vargas; and (3) the substance of any  
26 statements made by Mr. Lozano Vargas which the government intends to  
27 use, for any purpose, at trial. **This includes any hand-written notes**  
28 **made by agents and any co-conspirator's or material witness alleged**

1 **statements as well, as well as any video or audio recorded statements.**

2 See Fed. R. Crim. P. 16(a)(1)(A). Mr. Lozano Vargas also specifically  
3 requests that the circumstances surrounding any alleged waiver of his  
4 right to counsel and right to remain silent be disclosed as well.

5 Statements of Others; the defense moves for an order directing the  
6 government to permit the defense to inspect and copy any statements of  
7 any co-defendant or co-conspirator, material witness, or confidential  
8 informant that the government intends to offer against defendant under  
9 Fed. R. Evid. 801(d)(2)(E), including, but not limited to:

10 (A) Relevant written or recorded statements made by any co-  
11 defendant or claimed co-conspirator, indicted or  
12 unindicted, that are in the government's possession,  
custody, or control, or that through due diligence may  
become known to the government; and

13 (B) The substance of any oral statement that the government  
14 intends to offer in evidence at the trial of this matter  
15 made by any co-defendant or claimed co-conspirator,  
indicted or unindicted, before or after arrest, in  
response to interrogation by any person known to the  
declarant to be a government agent.

16  
17 (2) Mr. Lozano Vargas's Prior Record. Mr. Lozano Vargas  
18 requests complete disclosure of his prior record if one exists. See  
19 Fed. R. Crim. P. 16(a)(1)(B).

20 (3) Documents and Tangible Objects. Mr. Lozano Vargas requests  
21 the opportunity to inspect, copy, and photograph all documents and  
22 tangible objects which are material to the defense or intended for use  
23 in the government's case-in-chief or were obtained from or belong to  
24 him. See Fed. R. Crim. P. 16(a)(1)(C).

25 (4) Reports of Scientific Tests or Examinations. Mr. Lozano  
26 Vargas requests the reports of all tests and examinations which are  
27 material to the preparation of the defense or are intended for use by  
28 the government at trial. See Fed. R. Crim. P. 16(a)(1)(D). Mr. Lozano

1 Vargas notes that no fingerprint analyses have been produced. If such  
2 analyses exist, Mr. Lozano Vargas requests a copy.

3 (5) Expert Witnesses. Mr. Lozano Vargas requests the name and  
4 qualifications of any person that the government intends to call as an  
5 expert witness. See Fed. R. Crim. P. 16(a) (1) (E). Mr. Lozano Vargas  
6 requests written summaries describing the bases and reasons for the  
7 expert's opinions. See id. This request applies to any fingerprint and  
8 handwriting experts that the government intends to call.

9 (6) Brady Material. Mr. Lozano Vargas requests all documents,  
10 statements, agents' reports, and tangible evidence favorable to the  
11 defendant on the issue of guilt or punishment. See Brady v. Maryland,  
12 373 U.S. 83 (1963), Williams v. Taylor, 120 S.Ct. 1479 (2000), Strickler  
13 v. Greene, 527 U.S. 263 (1999).

14 Impeachment evidence falls within the definition of evidence  
15 favorable to the accused, and therefore Mr. Lozano Vargas requests  
16 disclosure of any impeachment evidence concerning any of the  
17 government's potential witnesses, including prior convictions and other  
18 evidence of criminal conduct. See United States v. Bagley, 473 U.S. 667  
19 (1985); United States v. Agurs, 427 U.S. 97 (1976); Kyles v. Whitley,  
20 514 U.S. 419 (1995).

21 In addition, Mr. Lozano Vargas requests any evidence tending to  
22 show that a prospective government witness: (I) is biased or prejudiced  
23 against the defendant; (ii) has a motive to falsify or distort his or  
24 his testimony; (iii) is unable to perceive, remember, communicate, or  
25 tell the truth; or (iv) has used narcotics or other controlled  
substances, or has been an alcoholic. *This would specifically include*  
any and all reports involving any investigations and grand jury  
testimony pertaining to the investigating and arresting agents or

1 confidential sources in this case.

2 (7) Request for Preservation of Evidence. Mr. Lozano Vargas  
 3 specifically requests the preservation of all physical or documentary  
 4 evidence that may be destroyed, lost, or otherwise put out of the  
 5 possession, custody, or care of the government and which relate to the  
 6 arrest or the events leading to the arrest in this case.

7 (8) Any Proposed 404(b) Evidence. "[U]pon request of the accused,  
 8 the prosecution . . . shall provide reasonable notice in advance of  
 9 trial . . . of the general nature" of any evidence the government  
 10 proposes to introduce under Rule 404(b). Fed. R. Evid. 404(b). Mr.  
 11 Lozano Vargas requests such notice as soon as possible, in order to  
 12 allow for adequate trial preparation.

13 (9) Witness Addresses. Mr. Lozano Vargas requests the name and  
 14 last known address of each prospective government witness. He also  
 15 requests the name and last known address of every witness to the crime  
 16 or crimes charged (or any of the overt acts committed in furtherance  
 17 thereof) who will not be called as a government witness.

18 (10) Jencks Act Material. Mr. Lozano Vargas requests production  
 19 in advance of trial of all material discoverable pursuant to the Jencks  
 20 Act, 18 U.S.C. § 3500. This production will avoid needless delays at  
 21 pretrial hearings and at trial. ***This request includes any "rough" notes***  
 22 ***taken by the agents in this case;*** these notes must be produced pursuant  
 23 to 18 U.S.C. § 3500(e)(1). ***This request also includes production of***  
 24 ***transcripts of the testimony of any witness before the grand jury.***  
 25 ***Counsel would like access to all witnesses' last known address so an***  
 26 ***attempt can be made to contact them.*** See 18 U.S.C. § 3500(e)(3).

27 (11) Residual Request. Mr. Lozano Vargas intends by this  
 28 discovery motion to invoke his rights to discovery to the fullest extent

1 possible under the Federal Rules of Criminal Procedure and the  
2 Constitution and laws of the United States. Mr. Lozano Vargas requests  
3 that the government provide his and his attorney with the above-  
4 requested material sufficiently in advance of trial.

5 (12) Government Examination of Law Enforcement Personnel Files Mr.  
6 Lozano Vargas requests that the government examine the personnel files  
7 and any other files within its custody, care or control, or which could  
8 be obtained by the government, for all testifying witnesses. Mr. Lozano  
9 Vargas requests that these files be reviewed by the government attorney  
10 for evidence of perjurious conduct or other conduct like dishonesty, or  
11 any other material relevant to impeachment, or any information that is  
12 exculpatory, pursuant to its duty under United States v. Henthorn, 931  
13 F.2d 29 (9th Cir. 1991).

14 The obligation to examine files arises by virtue of the defense  
15 making a demand for their review: the Ninth Circuit in Henthorn  
16 remanded for in camera review of the agents' files because the  
17 government failed to examine the files of agents who testified at trial.  
18 This Court should therefore order the government to review all such  
19 files for all testifying witnesses and turn over any material relevant  
20 to impeachment or that is exculpatory to Mr. Lozano Vargas prior to  
21 trial. Mr. Lozano Vargas specifically requests that the prosecutor, not  
22 the law enforcement officers, review the files in this case. The duty  
23 to review the files, under Henthorn, should be the prosecutor's and not  
24 the officers'. Only the prosecutor has the legal knowledge and ethical  
25 obligations to fully comply with this request.

26 //  
27 //  
28 //

III.

**THE COURT SHOULD ALLOW JOINDER WITH CO-COUNSEL'S MOTIONS**

Mr. Lozano Vargas would also like to join in co-counsel's motions which may be filed concurrently with his on the same day.

IV.

THE COURT SHOULD GRANT LEAVE TO FILE FURTHER MOTIONS

8       In order to properly present additional pretrial motions, Mr.  
9 Lozano Vargas needs more information which may be provided through  
10 counsel's discovery request. As more information comes to light and as  
11 additional research and/or investigation is completed, additional  
12 substantive motions may be necessary. Accordingly, Mr. Lozano Vargas  
13 requests that the Court permit his to file further motions before trial.

v.

## CONCLUSION

For the foregoing reasons, Mr. Lozano Vargas respectfully requests that the Court grant his motions.

Respectfully submitted,

Dated: January 11, 2008

s/ *Holly S. Hanover*

Holly S. Hanover

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